

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

AVAYA INC.,

Plaintiff,

v.

RAYMOND BRADLEY PEARCE, *et al.*,

Defendants.

Case No. [19-cv-00565-SI](#)

**ORDER DENYING DEFENDANT  
ATLAS SYSTEMS INC.'S MOTION TO  
LIFT STAY WITH RESPECT TO  
DEFENDANT PEARCE OR  
ALTERNATIVELY FOR STAY OF  
ENTIRE CASE**

Re: Dkt. No. 48

Defendant Atlas Systems Inc. ("Atlas") has filed a motion to lift the stay with respect to defendant Pearce, or alternatively for a stay of the entire case. The motion is scheduled for a hearing on May 10, 2019. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral argument, and VACATES the hearing. For the reasons set forth below, the Court DENIES the motion without prejudice to renewal at a later date.

**BACKGROUND**

On January 31, 2019, plaintiff Avaya Inc. ("Avaya") filed this lawsuit against numerous defendants, including former Avaya employee, Raymond Bradley Pearce, and Atlas. The first amended complaint ("FAC") alleges that "[f]or years, Defendants have been perpetrating a massive illegal software piracy operation, which resulted in the theft and subsequent resale of thousands of unauthorized Avaya Internal Use Software Licenses ('Internal Use Licenses') to end customers duped into buying pirated software, rather than buying genuine Avaya software licenses through authorized Avaya distribution channels." FAC ¶ 1 (Dkt. No. 59). According to the FAC,

Long-term Avaya employee Defendant Pearce, in collusion with former Avaya authorized reseller Defendant Hines, willfully resold and distributed, and facilitated the further distribution and resale of, thousands of Avaya Internal Use Licenses –

*Id.* ¶ 2. The FAC alleges claims for trademark infringement and counterfeiting, unfair competition, copyright infringement, unjust enrichment, and violations of a number of other federal statutes.

On March 20, 2019, the Court granted a stipulation filed by Avaya and Pearce under which Pearce withdrew his motion and Avaya and Pearce agreed that the Court should stay this action against Pearce only.

## DISCUSSION

<sup>1</sup> Atlas notes that Pearce did not file an opposition. However, in light of Pearce's *pro se* status, the Court does not attribute any significance to his failure to file an opposition.

Avaya argues that the general rule in the Ninth Circuit is that parallel criminal and civil proceedings may proceed concurrently, and Avaya notes that Atlas does not assert that its own Fifth Amendment rights have been implicated. In addition, Avaya contends that if the stay against Pearce is lifted, Atlas would still not be able to obtain full discovery from Pearce because he and his criminal counsel have represented to the Court that Pearce will invoke his Fifth Amendment privilege against self-incrimination. Avaya also argues that a complete stay of this action would significantly prejudice Avaya, and Avaya notes that it has claims against Atlas that are independent of Pearce relating to Atlas' alleged sales of counterfeit "Avaya" branded phones and "gray market" Avaya phones. *See* FAC ¶¶ 3, 38-39.

"The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995). "In the absence of substantial prejudice to the rights of the parties involved, [simultaneous] parallel [civil and criminal] proceedings are unobjectionable under our jurisprudence." *Securities & Exchange Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980). A court has discretion to stay civil proceedings when in the interest of justice. *Keating*, 45 F.3d at 324. "The decision whether to stay civil proceedings in the face of a parallel criminal proceeding should be made 'in light of the particular circumstances and competing interests involved in the case.'" *Id.* (quoting *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989)).

This means the decisionmaker should consider the extent to which the defendant's fifth amendment rights are implicated. In addition, the decisionmaker should generally consider the following factors: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

*Id.* at 324-35 (internal quotation marks and citation omitted).

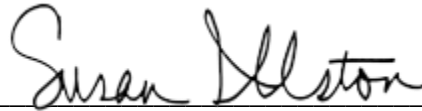
The Court has considered the *Keating* factors and the circumstances of this case, and concludes that at this time it is not appropriate to lift the stay as to Pearce or to stay the entire action. In light of the pending criminal investigation, lifting the stay is not likely to facilitate Atlas' ability to take discovery from Pearce, particularly since at this time criminal charges have not been filed and thus the scope of the criminal case is not known. The Court also notes that several defendants,

1 including Atlas, have filed motions to dismiss the FAC, and other defendants have not yet responded  
2 to the FAC and thus additional motions to dismiss may yet be filed. It is in the interest of judicial  
3 efficiency to resolve these motions and settle the pleadings, which in any event must be done prior  
4 to the commencement of discovery. The Court is mindful of the concerns expressed by Atlas (and  
5 the other defendants), and the Court will work with the parties to craft a case management schedule  
6 that takes these concerns into consideration. Further, the Court understands that at some point, Atlas  
7 and the other defendants will need to conduct discovery on Pearce, and the Court is amenable to  
8 reevaluating the propriety of the partial stay at a later date.

9 Accordingly, the Court DENIES Atlas' motion without prejudice to renewal at a later date.  
10 In addition, the Court directs Avaya to monitor the status of Pearce's criminal proceedings and to  
11 inform the Court through a letter filed on the docket when any criminal charges are filed.

12 **IT IS SO ORDERED.**

13  
14 Dated: May 8, 2019



\_\_\_\_\_  
SUSAN ILLSTON  
United States District Judge